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No. 96-823

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

STATE OF KANSAS,

Petitioner,

vs.

KYM MYERS,

Respondent.

BRIEF IN OPPOSITION

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In The
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October Term, 1996

STATE OF KANSAS,

Petitioner,

vs.

KYM MYERS,

Respondent.

BRIEF IN OPPOSITION

Respondent, Kym Myers, requests that the Court deny the Petition for Writ of Certiorari filed by the State of Kansas seeking review of the decision of the Kansas Supreme Court, entered on August 23, 1996. The opinion upheld the constitutionality of the registration provisions of the Kansas Sex Offender Registration Act (K.S.A. §§ 22-4901-4910) but declared that the public disclosure provision of that same act to be punishment in violation of the Ex Post Facto Clause of Art. 1 § 10 of the Constitution as applied to anyone whose offense occurred before the effective date of the statute. The opinion is reported at 260 Kan. 669, 923 P.2d 1024 (1996), and is included as Appendix A to the State's Petition for Writ of Certiorari.

QUESTION PRESENTED

The public disclosure provision of the Kansas Sex Offender Registration Act (K.S.A. §§ 22-4901-4910) constitutes punishment in violation of the Ex Post Facto Clause of Art. 1 § 10 of the Constitution as applied to anyone whose offense occurred before the effective date of the statute.

STATEMENT OF THE CASE

The Conviction and Sentencing

Respondent was convicted in 1991 of one count of rape and one count of sexual battery (*K.S.A. §§ 21-3502, 21-3517*). The Kansas Court of Appeals reversed the conviction and remanded the case for a new trial. *State v. Myers, No. 67,626 (unpublished opinion) (Kan. App. 1993)*. The opinion was affirmed by the Kansas Supreme Court. *State v. Myers, 255 Kan. 3, 872 P.2d 236 (1994)*.

Following the remand and plea negotiations with the State, Respondent pled no contest to one count of aggravated sexual battery (*K.S.A. § 21-3518*). Respondent, who had already served 33 months of imprisonment, was placed upon probation. At sentencing, the court also informed Respondent that he was required to register as a sex offender under the State's then-new sex offender law. (R. II at 42-44). Respondent's objections to retroactive imposition of this requirement were overruled.

Approximately four months later, Respondent moved to

modify the conditions of his probation, again arguing that the retroactive imposition of the sex offender registration requirements upon him constituted additional punishment in violation of the constitutional provision against Ex Post Facto legislation. Respondent explained to the court the difficulties caused by the new act:

> Now, [the Act] has caused me more problems that going to prison. I was evicted from my mother's apartment; left me virtually homeless. I had nowhere to go. I didn't have anyone to rent to me. I didn't know what to do. I had to go to a halfway house. I've been on television. I've been in -- Overland Park publishes every Friday.
>
> I can't live like this and every morning I get up to look at the paper--I'm paranoid. I can't take this. I'm about ready to crack, okay? I live with 12 other guys.
>
> They are about ready to kick me out on the street. I have no money. I don't know what I'm going to do. At least in prison I knew I had a place to sleep. I would rather go back to prison. I can't do this. (R. IV 14; Pet. App. 4a).

Respondent's motion was again denied.

Respondent subsequently appealed his conviction to the Kansas Court of Appeals. He argued that the requirement of registration as a sex offender and the unfettered public access permitted the public of the registration information, as applied to him, violated the Ex Post Facto Clause of Article I § 10 of the Constitution, as well as the Eighth Amendment's Cruel and Unusual

Punishment Clause. Respondent also argued that the Act violated procedural due process. The Supreme Court agreed to a motion to transfer the case and, on August 23, 1996, the Court found the Act, in part, to violate the Ex Post Facto Clause. The Court upheld the Act's registration requirement, but ruled unanimously that broad public access provision violated Ex Post Facto when applied to prisoners whose criminal conduct occurred prior to the statute's effective date. The Court declined to decide Respondent's cruel and unusual punishment and due process claims. Pet. App. 44a-46a.

The Sex Offender Registration Act

The Kansas Sex Offender Registration Act, first passed in 1993, and amended in 1994, requires the registration of individuals convicted "after the effective date of this act" of any "sexually violent crime." *K.S.A.* § *22-4902.*[1] The Act defines Sexually Violent Crime to include a number of different felony offenses, including rape, indecent liberties with a child, aggravated indecent liberties, criminal sodomy, aggravated criminal sodomy, indecent solicitation of a child, aggravated indecent solicitation, sexual exploitation of a child, aggravated sexual battery, any comparable felony committed in another state, or any attempt, conspiracy or solicitation to commit the above offenses. *K.S.A.* § *22-4902(b).* These offenses include both violent crimes and offenses that involves voluntary sexual contact that is considered criminal because of the minority status of the victim and the fact that the victim is not married to the accused. In addition to requiring registration for those convicted of the listed offenses, the Act requires registration if the defendant commits an act for any "offense" that the trial court finds to have been "sexually motivated." *K.S.A.* § *22-4902(b)(12).* The failure of a defendant to register is a class A nonperson

misdemeanor. *K.S.A. § 22-4903.*

The officials at institutions where a sex offender is incarcerated are obligated to inform him of his duty to register. The offender must register within 15 days of his arrival in any county in which he resides and must report any change of address. The registration requirement continues for 10 years after release for a first offender, and for 20 years for a repeat offender. The registration requirement can only be relieved if the offender convinces the court, by a preponderance of the evidence, that the offender is "rehabilitated." *K.S.A. §§ 22-4904, 4905, 4906, 4908.*

The offender must provide his name, date of birth, offense or offenses committed, including the date and county of conviction, a photograph, fingerprints and a social security number. *K.S.A. § 22-4907.* While, prior to 1994, this information was considered confidential, during the 1994 session of the legislature, the statute was amended to provide that "The statements or any other information required by this act shall be open to inspection in the sheriff's office by the public and specifically are subject to the provisions of the Kansas open records act." *K.S.A. § 22-4909.* There are no restrictions placed by the Act on the individuals who may request disclosure or the use made of the disclosed information.

The Decision of the Supreme Court

The unanimous opinion of the Kansas Supreme Court carefully reviewed the language of the Sex Offender Registration Act, this Court's prior decisions on Ex Post Facto legislation, the law in the other 49 states and federal jurisdictions, and the decisions of the federal courts that have ruled on this question. While upholding the registration provisions and contained in the Act, the Court found the public access provision of *K.S.A. § 22-4909* to

be so excessive and unrelated to public safety as to constitute punishment. Therefore, for the small class of individuals whose conduct occurred prior to April 14, 1994, the effective date of that section, but whose convictions were had after July 1, 1993, the effective date of the statute, the public notification section was held to operate as Ex Post Facto legislation. The court ordered, for those individuals, that each sheriff's office shall adopt a record system that prevents public access or disclosure of the statement or any other information required by KSORA. Pet. App. 46a.

As noted, before rendering its decision, the unanimous Court canvassed in detail the registration laws in the other states. The court noted that the definition of sex offenders was not limited to those committing violent crimes and could include anyone convicted of a misdemeanor offense if it were sexually motivated. Pet. App. 42a. The Court also noted that the State's disclosure provision was extremely broad, providing unrestricted public access. The Court concluded that it could find no other state disclosure provision broader than that in Kansas. Pet. App. 8a.

To determine whether the regulation was regulatory or penal, and thus subject to the Ex Post Facto Clause, the Court applied the test enunciated in *United States v. Ward, 448 U.S. 242 (1980)*, and utilized most recently in *United States v. Ursery, 116 S.Ct. 2135 (1996)*. The Court first examined whether the legislative intent was that the act was to be criminal/punitive. Finding that it was not, the Court examined whether the "statutory scheme was so punitive either in purpose and effect as to negate that intention." Pet App at 17a (quoting *United States v. Ward, 448 U.S. 242, 248-49 (1980)*).

The Court noted that, prior to this Court's decision in *United States v. Ursery*, supra, there had been some confusion in the lower courts concerning whether, in making the inquiry concerning the punitive effect of the

notification provisions, the courts should apply the factors set forth in this Court's decision in *Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)*. The Kansas Supreme Court found that this Court's decision in *Ursery*, which utilized the factors in *Kennedy* in deciding whether civil in rem forfeiture should be considered punitive for double jeopardy purposes, had, at least by implication, eliminated the confusion. The Court stated: "We conclude that *Ursery* has endorsed the *Mendoza/Martinez* factors for consideration in the punitive/non-punitive effect analysis." Pet. App. 26a.

After canvassing both state and federal decisions on different notification provisions, the Court upheld the statute's registration requirements, but concluded that the public disclosure provision constituted additional punishment for Ex Post Facto purposes. The Court identified three principal grounds for its conclusion.

First, it noted that the public disclosure provision constituted an "affirmative disability." The Court stated that the absence of any control on the registration information would allow routine publication of registration data in newspapers or the dissemination of information by anyone, for any reason. The Court noted that such disclosure could make it impossible for an offender to find housing or employment, as well as cause the offender to suffer stigma and ostracism. Pet. App. 37a-38a.

Second, the Court held that the disclosure provisions fostered the criminal law goals of retribution and deterrence. The Court noted that the disclosure provisions had an obvious deterrent effect, and that the stigma that will accompany public exposure of the registered information "could be viewed as a form of retribution." Pet. App. 38a. Critically, the Court stated that if, like many registration statutes, the law limited disclosure to that necessary to protect the public, its deterrent effect could be viewed as incidental to a non-punitive purpose. In

contrast, the unlimited public disclosure that is a part of the Kansas statute was held to provide a deterrent or retributive effect going beyond the State's legitimate non-punitive purpose. Pet. App. 38a-39a.

Third, and most significantly, the Court found the Kansas statute excessive in relation to its regulatory purpose, because of its failure to place restrictions on who is given access to the registered offender information or what that person does with the information. The Court noted that unrestricted public access leaves open the probability that registered sex offenders could suffer public stigma and ostracism. The Court also relied upon the extraordinary breadth of the definition of "sex offender" in the Kansas statute, which includes within its ambit any individual found to have committed a sexually motivated crime, whether felony or misdemeanor. Pet. App. 42a. The Court questioned whether all such individuals posed sufficient risks of reoffense that the registered information ought to be subject to unrestricted public access.

Finally, the Court noted that it would reach the same conclusion were it to follow any of the major approaches used by lower courts prior to this Court's decision in *Ursery*. The Court concluded that for Respondent, the disclosure provision must be considered punishment and, accordingly, a violation of the Ex Post Facto Clause as applied to him. Pet. App. 43a.

REASONS FOR DENYING THE WRIT

The Court should deny the writ of certiorari in this case for two reasons.

First, in rendering its opinion, the Kansas Supreme Court correctly applied the test for determining whether a provision is penal, rather than regulatory, and is therefore subject to the prohibition against Ex Post Facto legislation. The standard used by the Kansas Supreme Court was the

standard that has been approved by this Court and that was accepted as the appropriate test by both parties to this litigation. While we agree that this Court's pronouncements on the dividing line between punitive and remedial statutes represent something less than a precise formula, and that this formula is not always easy to apply, we believe that the Petitioner overstates the degree of confusion on how to go about the inquiry, particularly after the guidance provided by this Court's opinion in *United States v. Ursery*, *supra*. We also note that this Court has declined on several occasions to enunciate a precise formula, that it is not clear that any such formula exists, and that the Petition for Certiorari does not attempt to suggest what a more precise formula might be.

Second, the adjudication in this case concerns a statute that is in critical respects unique. Accordingly, resolution of the constitutional issues by this Court will not provide the guidance that Petitioner asserts other legislatures require concerning their very distinct statutes. As the Kansas Supreme Court noted, The definition of "sexual offender" in the Kansas statute and the complete absence of restraint on disclosure distinguish the Kansas statute from every other state scheme that has been the subject of litigation. In particular, this statute is utterly different from the "tier" notification statutes that have been the subject of much of the litigation concerning offender notification provisions in the lower courts. A resolution of the constitutionality of the Kansas statute will say little, one way or the other, about the constitutionality of these notification provisions.

1. The Kansas Supreme Court Correctly Decided This Case Under the Appropriate Constitutional Standard.

This Court has consistently used a two-step approach to determine whether legislation is subject to constitutional restrictions, such as the Ex Post Facto Clause, applicable

to criminal proceedings. *United States v. Ursery, 116 S.Ct. 2135, 2142, 2147 (1996)*. The first step is to decide whether the legislature intended to create a civil/remedial or criminal/punitive sanction. The second step is to decide "whether the statutory scheme was so punitive either in purpose or effect as to negate [the legislature's] intention to establish a civil remedial mechanism." *Ursery, 116 S.Ct. at 2142* (quoting *United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365 (1984)*); *see United States v. Ward, 448 U.S.242 (1980)*. In making this latter determination, both this Court and lower courts have been guided by this Court's decision in *Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)*, which held that a statute that stripped citizenship from persons who had fled the United States in order to avoid military service was punitive in character. Before recounting the legislative history that the Court found critical, the Court listed several factors which, "are all relevant to the inquiry and may often point in different directions." 372 U.S. at 169:

> 1)Whether the sanction involves an affirmative disability or restraint,
> 2)whether it has historically been regarded as punishment,
> 3)whether it comes into play only upon a finding of scienter,
> 4)whether its operation will promote the traditional aims of punishment--retribution and deterrence,
> 5)whether the behavior to which it applies is already a crime,
> 6)whether an alternative purpose to which it may rationally be connected is assignable to it, and
> 7)whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69.[2] This Court utilized this two-part test, with reliance on factors mentioned in *Mendoza-Martinez*, less than a year ago in its decision in *Ursery*.

This Court has emphasized that the problem of whether an action is regulatory or punitive "has been extremely difficult and elusive of solution." *Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)*. However, although given the opportunity repeatedly, and as recently as last summer in *Ursery*, this Court has eschewed the attempt to construct a universal formula for defining punishment in all cases. Indeed, the Court has emphasized that the question of whether a "legislative adjustment" is of "sufficient moment" to constitute punishment "must be a matter of degree." *California Dep't of Corrections v. Morales, 115 S.Ct. 1597, 1603 (1995)*(emphasis added).

The opinion of the Kansas Supreme Court faithfully applied this Court's directions. The Court examined the legislative intent evinced by the statute, and then examined the statute's actual impact. After examining the effect of the notification provision, its retributive and deterrent character, and its excessiveness, the Court determined that the notification provision is punishment for ex post facto purposes. Pet. App. 36a-44a.

Petitioner, although obviously opposed to the result reached by the unanimous court, fails at any point to assert that the test chosen by the Kansas Supreme Court was incorrect. That omission is not accidental, for the mode of analysis used by the Court, including consideration of the factors mentioned by *Mendoza-Martinez*, was utilized by the State in its brief to the Kansas Supreme Court.[3] It is also the standard that the State of Kansas has urged the Supreme Court to adopt for the Ex Post Facto Clause in a case currently before the Court. *Hendricks v. State of Kansas, Sup. Ct. No. 95-9075,* Brief of Cross Respondent at 16 (argued Dec. 10, 1996).

Moreover, as the Petitioner notes, it is the standard

utilized by the vast majority of courts that have grappled with the issue of whether sex offender notification statutes are punishment, and thereby subject to the Ex Post Facto Clause. See *Doe v. Pataki, 940 F. Supp. 603 (S.D.N.Y 1996); Roe v. Office of Adult Probation, 938 F. Supp. 1080 (D. Conn. 1996); Artway v. Attorney General, 876 F. Supp. 666, 673 (D.N.J. 1995); Rowe v. Burton, 884 F. Supp. 1372, 1378 (D. Alaska 1994); State v. Ward, 123 Wash.2d 488, 869 P.2d 1062, 1068 (1994); State v. Manning, 532 N.W.2d 244, 247 (Minn. Ct. App. 1995); State v. Noble, 171 Ariz. 171, 175, 829 P.2d 1217 (1992).*

Despite its agreement with the standard applied in the Kansas Supreme Court, and the fact that the majority of cases is in accord, Petitioner suggests that review is warranted because two cases decided before this Court's opinion in *United States v. Ursery* have questioned the relevance of the factors cited in *Mendoza-Martinez* to the analysis of whether a statute is penal or regulatory. *See Artway v. Attorney General, 81 F.3d 1235, 1262 (3d Cir. 1996); Doe v. Poritz, 142 N.J. 1, 63-73, 662 A.2d 367 (1995).*[4] We believe that review to determine the relevance of the *Mendoza-Martinez* factors is not necessary now, assuming it ever was. As the Kansas Supreme Court recognized in *Myers*, whatever confusion may have existed prior to this Court's decision in *United States v. Ursery* was effectively resolved by that decision. In *Ursery*, This Court both utilized factors mentioned in *Mendoza-Martinez* in arriving at its decision and abjured construction of any rigid test for determining whether a regulation is punitive or remedial. See Pet. App. at 24a-26a; accord, *W.P. v. Poritz, 931 F. Supp. 1199 (D.N.J. 1996); Roe v. Office of Adult Probation, 938 F. Supp. 1080 (D. Conn. 1996).*

Moreover, granting a petition for writ of certiorari to resolve the "conflict" over the standard of review would be inappropriate, since it would be unlikely to change the decision reached by the Kansas Supreme Court. The Court

was aware of the standards used by those courts that, unlike the parties in *Myers*, had questioned the relevance of *Mendoza-Martinez*. The Court expressly stated that it would reach the same conclusion whether it applied "the New Jersey Supreme Court's approach in John Doe, the three-prong analysis in Artway, the considerations listed in W.P., or the Mendoza-Martinez factors." Pet. App. at 43a.

In sum, the Court should deny review because the legal standards in this case, although concededly difficult to apply, are not genuinely in dispute, because the parties in fact agree on the basic standards, because this Court has previously eschewed attempting a rigid set of standards and because, under any proposed test, the decision of the Kansas Supreme Court is correct.

2. The Kansas Supreme Court's Proper Resolution of The Constitutionality of Its Own Unique Statue Does Not Furnish An Appropriate Vehicle For A General Decision on the Constitutionality of Sex Offender Registration Laws.

In addition to seeking to use this case as a vehicle to clarify the standards for resolving Ex Post Facto challenges, Petitioner seeks this Court to review the decision because the "Ex Post Facto issues raised are important and recurring" (Pet. App. 15) and because of the belief that resolution of this case will provide "guidance and clarity" in this important and difficult area of the law. While we agree completely with Petitioner that the issues raised in sex offender notification statutes are important to both the public and to the offenders targeted by such laws, we disagree that this case presents an appropriate vehicle for resolution of the most difficult questions presented by these statutes.

As Petitioner states, the Kansas Supreme Court placed primary emphasis "on whether the statute was excessive in relation to its underlying goal" (Pet. at 7). In making its

finding of excessiveness, the Kansas Supreme Court relied heavily upon two features of the Kansas Sex Offender Registration Act that it regarded as unique, or nearly so: the lack of limitation on the individuals who could be labelled as sex offenders, and the complete absence of restriction on who could be given information concerning sex offenders and what those individuals might do with such information. Pet App. 39a-42a. As to the first of those factors, the Kansas statute is almost surely the broadest in the nation, requiring registration of individuals who have committed most felony sex crimes, as well as any individuals found by the court to have committed a crime that is "sexually motivated." That definition is broad enough to require and permit notification of an individual convicted of misdemeanor theft of a sexually explicit magazine, so long as the court were to find that the theft was committed "for the purpose of the defendant's sexual gratification." *K.S.A. § 22-4902(b)(12)*. In addition to the breadth of the definition of sex offenders, the Act places no limit on the ability of the public to access this information or limits on what it can do with it. There are no restrictions limiting access on need to know, requiring those who obtain access to identify themselves, limiting the use placed on the information, or limiting the category of offenders to those who pose a substantial danger to public safety. The unique combination of these factors, according to the Kansas Supreme Court, permitted release of information beyond that which was necessary to protect public safety, thereby rendering it punitive in fact. The conclusion of the court was that to avoid Ex Post Facto difficulties, "public access should be limited to those with a need to know the information for public safety purposes." Pet. App. 44a.

The thorough opinion of the Court, as well as the detailed summary of state statutes on sex offender notification laws provided by Petitioner, fully supports the

Court's conclusion that the Kansas Statute is unique, or nearly so. Because of that fact, resolution of the validity of the Court's decision by this Court is unlikely to provide an answer to the question of whether the very different statutes passed by different state legislatures are punitive either in purpose or effect. In particular, resolution of the issues in this case will not provide a solution to the problem of whether the very different "tier" mandatory disclosure statutes that have been the subject of conflicting decisions in the lower courts are punishment within the meaning of the Ex Post Facto Clause.

As the Kansas Supreme Court's opinion and the Petition for Certiorari itself demonstrate, most of the state sex offender registration laws are far more circumspect than that of Kansas concerning when disclosure may occur, and most have accordingly been upheld by lower courts. Thus, many state statutes provide that registration information be maintained as confidential by law enforcement. *See, e.g., Ala.Code § 13A11-201, 13A-11202 (1994); Ark.Code Ann. § 12-12-909 (Michie 1995); Ky.Rev.Stat.Ann. § 17.510(11)(Michie Supp. 1996).* Other states permit disclosure, but limit that disclosure to agencies concerned with children, such as school boards, public schools and day care providers. *See Ind.Code Ann. § 5-2-12-11 (West Supp. 1996); Nev.Rev.Stat. § 207.155 (Michie Supp. 1995); Okla.Stat.Ann. tit. 57 § 584 E (West Supp. 1997).* Still others permit disclosure by law enforcement when the officials determine such disclosure to be in the interests of public safety. See, e.g., *Colo.Rev.Stat.Ann. § 18.3-412.5(6.5)(West Supp. 1996); La.Rev.Stat. 15:546 (1995); Me.Rev.Stat.Ann., tit 34-A §11143 (West Supp. 1996).* As the Kansas Supreme Court noted, the courts interpreting these more carefully limited disclosure laws have generally held these laws to be regulatory rather than punitive, and therefore not subject to the Ex Post Facto Clause. *See Pet. App. 26a-32a (citing*

Snyder v. State, 912 P.2d 1127, 1129 (Wyo. 1996)(access only to individuals authorized by law to receive information); *State v. Noble, 171 Ariz. 171, 829 P.2d 1217 (1992)*(limited dissemination to particular agencies when necessary to serve regulatory purpose); *State v. Costello, 138 N.H. 587, 590, 643 A.2d 531 (1994)*(New Hampshire information confidential); *State v. Ward, 123 Wash.2d 488, 869 P.2d 1062 (1994)*(dissemination when necessary for public protection); *People v. Starnes, 273 Ill. App. 3d 911, 653 N.E.2d 4 (1995)*(former Illinois statute, information confidential); *State v. Manning, 532 N.W.2d 244 (Minn. App. 1995)*(information kept confidential). There appears to be little or no conflict or confusion in judicial interpretation of these statutes, which comprise the great majority of state sexual offender notification laws. Not only are these courts not in need of a Supreme Court decision, they are interpreting statutes that are sufficiently distinct from the Kansas notification scheme that it is unlikely that a decision by this Court would resolve questions of their constitutionality.

Nor will a decision on the Kansas statute provide guidance concerning the type of statute that has prompted a division among the lower courts, the so-called "tier" mandatory notification provisions, for those laws are unlike the Kansas law in design and effect. Under these schemes, offenders are grouped, according to potential for recidivism, in several categories, with different potential for notification based upon the level of danger. See, e.g., *N.J. Stat.Ann. § 2-C7-7(1995)*(if risk is low, registrant information released only to law enforcement, if risk is moderate, law enforcement must notify organizations in the community, with information gained not to be shared with the public and used only to assist in protecting children, battered women or rape victims, if risk is high, law enforcement must notify organizations in the community and individual members of the public likely to encounter

the offender); *N.Y.Corr.Law § 168-1 (1996); Conn.Gen.Stat.Ann. §54-102r(1996); Mass.Gen.Laws Ann. ch 6 § 178K (West. Supp. 1996); Minn.Stat.Ann. § 244,052, subd. 4 (West Supp. 1997), (effective Jan. 1, 1997); R.I. Gen. Laws § 11-37.1-12 (Michie Supp. 1996).* Typically, the placement in a particular risk category requires some due process protection. *See Doe v. Poritz, 142 N.J. 1, 106, 662 A.2d 367, 420 (1995).*

As the Kansas Supreme Court noted in *Myers*, these elaborate statutes clearly differ from the Kansas Sex Offender Registration Act in their careful attention to tailoring the scope of notification to the offender's risk level. Pet. App. 26a. They also differ by providing due process protections. Finally, they differ because, for the highest-risk offenders, they mandate notification. These statutes, which have produced most of the litigation, particularly in federal court, on the question of punishment, present issues of importance and have divided the lower courts. *Compare Doe v. Poritz, supra; Opinion of the Justices of the Senate, 423 Mass. 1201, 668 N.E.2d 738, 753 (Mass. 1996)*; and *W.P. v. Portiz, 931 F. Supp. 1199 (D.N.J. 1996)*, with *Doe v. Pataki, 940 F. Supp. 603 (S.D.N.Y. 1996)*; *Roe v. Office of Adult Probation, 938 F. Supp. 1080 (D. Conn. 1986).* However, there is simply no reason to believe that a decision on the Kansas statute, which is utterly different in structure, in impact, and in its legislative history, will provide an answer to the courts wrestling with the validity of tiered notification systems.[5]

CONCLUSION

For the foregoing reasons, Respondent Kym Myers respectfully requests that this Court deny this petition for a writ of certiorari.

Respectfully submitted,

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1.The Act is set out in full in Appendix B to the Petition for Writ of Certiorari filed by Petitioner.

2.In *United States v. Ward*, this Court termed this list of considerations "helpful", although "certainly neither exhaustive nor dispositive." *448 U.S. at 249.*

3.State v. Myers, No. 95-74078, Brief of Appellee at 11 ("The factors to be considered in the determination of whether a law's punitive effect negates an otherwise regulatory purpose are set forth in Kennedy v. Mendoza-Martinez.")

4.Artway and Doe had determined that reliance on Mendoza-Martinez was inappropriate because of a footnote in this Court's opinion in *Austin v. United States, 509 U.S. 602, 610 n.6 (1993)*, which appeared to assert that Mendoza-Martinez was relevant only in the context of determining whether a proceeding is sufficiently criminal in nature to warrant criminal procedural protections of the Fifth and Sixth Amendment.

5.The Petition for writ of certiorari also identifies ten states that Petitioner asserts contain "passive notification" schemes similar to that in Kansas. However, each and every one is distinguishable in important respects from the statute considered by the Kansas Supreme Court. First, several apply to categories of offenders far more narrow than in Kansas. See Ga.Code Ann. § 42-9-44.1 (Michie 1994)(limited to child sex offenders); Ill. Comp.Stat. 152/120 (West. Supp. 1996)(same); N.Y.Correct.Law

§168-q (1996)(registry of "sexually violent predators"); Cal.Penal Code § 290.4 (West. Supp. 1996)(subdirectory of "sexual habitual violators"). For other states, in order to obtain information, the individual requesting it must provide specific information via a written request. Idaho Code §§ 18-8301, 9-340(11)(f)(ii) (Michie 1996); Mass. Gen. Laws Ann. ch 6 § 178I, 178J (West Supp. 1996)(individual receiving information also receives warning of criminal penalties for misuse of information). In other states, the information provided is less extensive than that available in Kansas. See Mont. Code Ann § 46-23-508(1)(1995)(name of sex offender is public record); Texas Rev.Civ.Stat.Ann. art 6252-13c.1 § 5(West. Supp. 1997)(some information is public record, photograph SSN, driver license number, street address or telephone number is confidential). Finally, in none of the statutes is the category of individual required to register as broad as the registration requirement in Kansas.